

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, (WCCME)
AFSCME, AFL-CIO
Involving Certain Employees of
KENOSHA COUNTY
(SHERIFF'S DEPARTMENT)

Case LXI
No. 32144 ME-2275
Decision No. 21909

Appearances:

Mr. Robert M. Chybowski, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 30203 Poplar Drive, Burlington, Wisconsin 53105, appearing on behalf of the Union.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Mark L. Olson, 815 East Mason Street, Milwaukee, Wisconsin 53202, and Mr. William P. Nickolai, Assistant Corporation Counsel, Kenosha County, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Wisconsin Council 40, AFSCME, AFL-CIO, on September 1, 1983, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to unconditionally include certain positions in the Kenosha County Sheriff's Department in an existing bargaining unit of Kenosha County Court House employees and Social Services Clerical employees. Hearing was set for November 10, 1983, then rescheduled to December 2 at the County's request, and then rescheduled to January 18 and 19 at the County's request, and then continued to January 27 due to the unavailability of the County's chief witness. The hearing on the petition was held on January 18 and 27, 1984 in Kenosha, Wisconsin before Examiner Carol L. Rubin. A stenographic transcript of the proceedings was prepared. On February 29, 1984, prior to receipt of briefs, the County made a written motion to reopen the record for submission of certain documents, which was denied by the Hearing Examiner. The County then filed a written motion to reopen hearing along with its brief. The last of the post-hearing briefs was received on April 4, 1984. The Commission, having reviewed the record and briefs, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit and Denying Motion to Reopen Hearing.

FINDINGS OF FACT

1. That Wisconsin Council 40, Local 990, AFSCME, AFL-CIO, hereinafter referred to as Local 990, is a labor organization representing municipal employees for the purposes of collective bargaining, and has its offices at 30203 Poplar Drive, Burlington, Wisconsin 53105.
2. That Kenosha County, hereinafter referred to as the County, is a county unit of government providing various governmental services, including a Sheriff's Department; that the County has its principal offices at the Kenosha County Courthouse, 912 56th Street, Kenosha, Wisconsin 53141.
3. That Local 990 was voluntarily recognized by the County, "at some point in the distant past", as the exclusive bargaining representative for a bargaining unit which is described in the most recent labor agreement as "Kenosha County Court House employees and Social Services Clerical employees, excluding elected officials, County Board appointed administrative officials, and building service employees"; that this unit currently includes approximately 125 employees, most of whom occupy clerical but also some technical and related positions such as Land Use Technician, Terminal Operator, Technician, and Appraiser; that while the majority of the members of the unit are located in either the Courthouse or the Social Services building, some unit members work out of different locations (there are three unit members who are clerical workers at the Highway Department offices,

one member at the Community and Family Health Office, and an Emergency Government employe and a Child Support Agency employe located in the new Safety Building); that some unit members, though located in the Social Services Department Building, are employed in a different department (there are three unit members who are employes at the Comprehensive Board, two members at the U.W. Extension, and one member at the County Veterans Office); that the major County departments were all originally located in the Courthouse (or Courthouse Annex), though recently added departments were not.

4. That there are currently a total of 10 bargaining units of County employes, including a Highway unit, an Institutional unit, a professional Social Services unit, a Parks unit, and the nonprofessional Courthouse and Social Services unit at issue here, all represented by AFSCME, Wisconsin Council 40, and further, a nurses unit, a deputy sheriff unit, an assistant attorneys unit, a custodial and maintenance unit, and a supervisory unit in the Sheriff's Department.

5. That from 1925 until October of 1982, the County Sheriff's Department was located in the Courthouse Annex which is across a court yard from the Courthouse; that in 1974 the County began to study the feasibility of building a new jail in a facility that would include the Kenosha City Police Department; that eventually a Kenosha City and County Joint Services Board was formed by the City and County as an independent agency; that a new Public Safety Building was constructed one block from the Courthouse to house both the County's Sheriff Department and the City's Police Department; that the Sheriff's Department actually moved into the new Public Safety Building in October, 1982.

6. That the Kenosha City and County Joint Services Board, an independent employer entity, employs persons to service the County Sheriff's Department and the City Police Department in the new Public Safety Building in the areas of records, evidence, communications and fleet maintenance; that most of such work for the Sheriff's Department had previously been performed by Deputy Sheriff's, Jailors or Matrons of the Sheriff's Department; that after an election in May 1983, Wisconsin Council 40, AFSCME, was certified as the exclusive bargaining representative of all regular full-time and regular part-time clerical and related and technical employes of the Kenosha City and County Joint Services Board. 1/

7. That there are employes of the County's Sheriff's Department working in the Public Safety Building in the following classifications: Executive Secretary (1 employe); General Receptionist/ Secretary (3 employes); Detective Unit Secretary (1); Civil Process Clerk (1); Bookkeeper I/Receptionist (1); Bookkeeper II (1); Booking (9); Control Center Operator (4); Chief Cook (1); Cook (2); and Cooks' Helpers (3).

8. That on September 7, 1983, Local 990 filed the instant unit clarification petition with the Commission requesting that the positions listed in Finding of Fact 7, except for the Executive Secretary whom Local 990 had previously agreed was a confidential employe, be included in the existing bargaining unit described in Finding of Fact No. 3.

9. That there are at least nine other clerical positions in the County that are not represented by Local 990, but which are included in other bargaining units, including an office clerk in the Parks Department, and two receptionists and six clerks at Brookside Care Center.

10. That Local 990 contends that it has historically been recognized as the exclusive bargaining representative for clerical-type employes in the Sheriff's Department, and that any newly created clerical-type positions in the Sheriff's Department should be included in the existing bargaining unit represented by Local 990.

11. That the County maintains that there is no history of representation by Local 990 of the positions listed in Finding of Fact 7, that because Local 990 is

1/ See Dec. No. 20609 (WERC, 6/83).

a voluntarily recognized unit, it is barred from seeking to expand the unit to include these employees, that the unrepresented employees have a distinct community of interest and do not wish to be accreted to the existing unit; that the chief cook is a supervisory and managerial employee, and that the Bookkeeper II is a confidential and managerial employee.

12. That in the past, at least three clerical employees of the Sheriff's Department were treated by the parties as included in the bargaining unit represented by Local 990, including Mildred Rennick who performed clerical duties in the Sheriff's Department from 1970 to 1981 and then bid for and received a position in the Corporation Counsel's office; Pam Polansky Rumbach, who paid fair share to Local 990 and who was a Computer Operator in the Sheriff's Department from approximately 1975 to 1982 until her position was eliminated when the Department moved into the Public Safety Building and who is now an employee of the Joint Services Board; and Nancy Van Tubbergen who was a Clerk Typist or Clerk Steno with the Sheriff's Department for approximately four months in 1980 before being laid off, and who presently occupies the Bookkeeper II position in the Sheriff's Department; and that, therefore, Local 990 has historically represented clerical-type employees in the Kenosha County Sheriff's Department.

13. That the 1982-83 collective bargaining agreement between the County and Local 990, the most recent available labor agreement, contains the following provision in Article V (Hours), Section 5.1 (Workday and Workweek Defined):

(a) Courthouse

. . .

In the event more than one (1) shift becomes necessary for clerical employees in the Kenosha County Sheriff's Department during the term of this Agreement, the parties agree to negotiate on the shift hours, assignment to shift, and the shift differential;

that said provision was added to the collective bargaining agreement in 1979, and that therefore, Local 990 has historically represented clerical-type employees in the Kenosha County Sheriff's Department.

14. That the deputies, jailers and criminal investigators of the Kenosha County Sheriff's Department have been represented by the Deputy Sheriff's Association.

15. That the work location of all of the contested positions is the Public Safety Building; and that, apart from the contested positions, Local 990 currently represents two other County employees in the Public Safety Building, i.e., a clerical worker in the Emergency Government Office, and a clerical worker in the Child Support Agency.

16. That prior to the reorganization and move into the Public Safety Building, none of the exact position titles at issue in this proceeding were in existence; that the position of Control Center Operator did not previously exist because there was no Control Center; and that the job duties presently performed by the employees in the other contested positions were performed primarily by jailers, matrons and deputies in the Sheriff's Department, although there have been at least three clerical employees in the Sheriff's Department who performed some clerical duties.

17. That on March 8, 1983, the County Board of Supervisors adopted a merit pay plan for the positions at issue, which is similar to but not identical to the wage rates paid to employees represented by Local 990, on the assumption that these positions were not included in the unit represented by Local 990.

18. That the duties of the positions of Bookkeeper/Receptionist, Bookkeeper II, General Receptionist/ Secretary, Civil Process Clerk and Detective Unit Secretary are primarily clerical in nature; that with the exception of the position of General Reception/Secretary, which has both a first and second shift and rotating weekend hours, the above positions work a standard first hour shift, five days a week, as do the vast majority of the employees represented by Local 990; that the above positions have little or no direct relationship to the jail operations.

19. That the duties of the Booking employees include intake tasks relating to receiving prisoners, making cell assignments, and observation of hallways, elevators and visiting areas for security purposes, as well as the preparation of forms and the maintenance of records; that the duties of the Control Center Operator include the monitoring of various security systems, entering commands to open and close doors and maintaining the security of the immediate work area as well as maintenance of records and reports; that Booking employees and Control Center Operators cover twenty-four hour shifts, seven days a week; that there is no evidence of Local 990 historically representing employees with such security duties.

20. That the duties of the Cooks and Cooks' Helpers primarily involve cooking duties in the preparation of meals for inmates and cleaning of the kitchen area; that Cooks' Helpers deliver food to the cell blocks and pick-up leftovers and utensils; that both positions work either the 6:00 a.m. to 2:00 p.m. or the 11:00 a.m. to 7:00 p.m. shifts, seven days a week; that there is no evidence of Local 990 historically representing cooks or Cook's Helpers.

21. That all employees of, and applicants to, the Sheriff's Department are required to undergo a background check for security purposes; that members of the Local 990 unit in other departments are not required to do so; that there is no common supervision between Sheriff's Department employees and current members of the Local 990 unit; that there is no evidence of common supervision between employees represented by Local 990 who are employed in different County departments; that there has been no transfer of employees in the Sheriff's Department to or from other County departments since the relocation in the Public Safety Building in October 1982.

22. That as of January 1983, the kitchen staff in the Public Safety Building included three cooks and three cooks' helpers; that Lt. Allan Kehl is generally responsible for jail operations; that prior to January of 1983, no single cook had been designated "chief cook", but that one cook, Mr. George Volpentesta, has assumed some supervisory duties; that on January 11, 1983, the Sheriff's Department requested the County Personnel Committee to reclassify Volpentesta to Chief Cook, and place him in a higher salary range, which was done; that Volpentesta currently completes written evaluations of the other kitchen employees; that Volpentesta has issued one verbal warning (which was documented in writing for the employee's file) and one written warning to kitchen employees; that there has been no suspension or discharge of a kitchen employee up to the date of hearing; that since Volpentesta has been designated Chief Cook, no other employees have been hired, nor have any other employees been promoted; that Volpentesta is in charge of scheduling, vacation requests, and assignment of overtime for kitchen employees; that Volpentesta is in charge of ordering all food commodities for the jail, maintaining records, managing all aspects of food service and preparation, and is consulted during the budget process regarding what budget is required for purchase of food and kitchen equipment; that Volpentesta exercises supervisory responsibility in sufficient combination and degree to make him a supervisory employee.

23. That the Department of Labor Relations and Personnel for the County currently has three full-time employees, a Personnel Director, an Executive Secretary, and a Personnel Technician, and a temporary part-time clerical employee, none of whom are members of any bargaining unit, and that all of these employees are involved in confidential labor relations matters to some degree; that in 1980 the County and Local 990 stipulated to the exclusion of the Executive Secretary in the Sheriff's Department from the bargaining unit represented by Local 990 on the basis that that position was a confidential position; and that the exclusion of said position on said basis has been stipulated by the parties in the instant proceeding.

24. That the position of Bookkeeper II was created in 1982 and is currently filled by Nancy Van Tubbergen; that the duties of that position as described in the 1982 posting for the position include clerical work; preparation and maintenance of financial files, documents, and records; preparation of simple financial reports; and maintenance of bookkeeping and budgetary records of budgetary line items, purchasing and related records; that the posting contains no mention of confidential labor relations duties; that, since assuming the position, Tubbergen has assumed increased responsibilities including departmental budget analysis, ordering and purchasing of office supplies for the Department, writing checks to individuals who transport prisoners to or from other prisons (according

to rates established by the County Board), and reviewing Worker's Compensation claims prior to forwarding them to the Personnel Department; that Tubbergen does not have authority to negotiate prices for services or products; that if a dispute arose regarding the adequacy of payment for transporting prisoners, Tubbergen would not have the authority to resolve it; that Tubbergen does not participate in the formulation, determination and implementation of policy in a significant manner nor does she have effective authority to commit the County's resources; that Tubbergen is one of four Departmental employees having complete access to all Departmental personnel files including information from background checks run on employees and applicants; that Tubbergen has not taken part in any negotiation sessions or strategy sessions regarding the County's negotiations with the Deputy Sheriff's Association, nor in any discussion relating to contract administration; that the Executive Secretary, a confidential position, usually takes minutes in meetings which deal with labor relations; that the Executive Secretary is actually assigned to the Sheriff; that the Chief Deputy Sheriff uses the services of both the Executive Secretary and the Bookkeeper II and does not have a single secretary assigned to him; that in the absence of the Executive Secretary, the Bookkeeper II fills in for her; that through vacation, personal days, illness and training, the Executive Secretary might be absent approximately six weeks per year; and that the Bookkeeper II does not have significant access to, knowledge of, or participation in matters relating to labor relations to be considered a confidential employee.

CONCLUSIONS OF LAW

1. That the employees of the Kenosha County Sheriff's Department described in Finding of Fact 7 are municipal employees within the meaning of Sec. 111.70(1)(b), MERA, with the exceptions of the Executive Secretary and the Chief Cook.

2. That the positions of General Receptionist/Secretary, Detective Unit Secretary, Civil Process Clerk, Bookkeeper I/Receptionist, and Bookkeeper II are appropriately included in the bargaining unit currently represented by Local 990 described in Finding of Fact 3.

3. That it is not appropriate to unconditionally include the positions of Booking, Control Center Operator, Cook and/or Cook's Helper referred to in Finding of Fact 7 in the aforesaid unit.

4. That the occupant of the position of Chief Cook is a supervisory employee and therefore is not a "municipal employee" within the meaning of Sec. 111.70(1)(b) of MERA.

5. That the parties have previously stipulated that the occupant of the position of Executive Secretary is a confidential employee and therefore is not a "municipal employee" within the meaning of Sec. 111.70(1)(b) of MERA.

6. That the occupant of the position of Bookkeeper II is neither a confidential nor a managerial employee, and is a "municipal employee" within the meaning of Sec. 111.70(1)(b) of MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law and Order, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT AND DENYING MOTION TO REOPEN HEARING 2/

1. That the County's motion to reopen the hearing is denied.

2. That the positions listed in Conclusion of Law 2, shall be, and hereby are, included in the existing collective bargaining unit currently represented by Local 990, Wisconsin Council 40, AFSCME, AFL-CIO.

(See Footnote 2 on Page 6)

3. That the balance of Local 990's petition is dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 17th day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner

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- 2/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency the proceedings shall be held as provided in ss. 182.70(6) and 182.71(3)(e). The proceedings shall be held

(Footnote continued)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PROCEDURAL MATTERS

Hearing was held in this matter on January 18 and 27, 1984. Briefs were originally due two weeks after receipt of the transcript which would have been on approximately March 1st. On February 29, 1984 the County made a written motion to the Examiner to reopen the record in the matter in order to introduce into the record a petition and letter to the Commission, dated February 22, 1984, submitted by some of the employees of the Sheriff's Department who were the subject of the unit clarification petition. The petition, which was signed by 17 employees, stated that the employees did not wish to be included in the bargaining unit represented by Local 990 but wished to form their own bargaining unit. The County argued that it could not have submitted said document at hearing since it was not in existence until February 22, 1984. On March 2, 1984, Local 990 submitted a statement in opposition to the County's motion. In a letter on March 7, 1984 the Examiner denied the County's motion to reopen the record to admit the document due to the circumstances of the document's submission and its questionable relevancy; the document was, however, made a part of the case file.

In its brief and accompanying letter, received on March 13, 1984, the County moved to reopen the hearing in the matter, in order to substantiate the circumstances of the submission of the document, and to argue the relevancy of the document. Further, in its brief, the County devoted several pages of argument to the proposition that inclusion of the employees in question in Local 990's existing bargaining unit would contravene their express wishes and would constitute a direct interference with their right to self-determination. The County further contends that if it is precluded from arguing the relevancy of this document it will be denied due process of law.

The Examiner's action has not denied the County due process of law. In its written arguments, the County has had the opportunity to argue the relevancy of the documents it wishes to submit. The Commission has treated those documents and arguments as an offer of proof. Upon review of the offer of proof we have denied the motion to reopen the hearing for the following reasons.

ERB 10.19, Wisconsin Administrative Code, provides that "a hearing may be re-opened on good cause shown." The Commission has set forth the standard to be applied in considering a motion to reopen hearing. The moving party must show:

- (a) That the evidence is newly discovered after the hearing,
- (b) that there was no negligence in seeking to discover such evidence,
- (c) that the newly discovered evidence is material to that issue,
- (d) that the newly discovered evidence is not cumulative,
- (e) that it is reasonably possible that the newly discovered evidence will affect the disposition of the proceeding and
- (f) that the newly discovered evidence is not being introduced solely for the purpose of impeaching witnesses. 3/

After consideration of the County's offer of proof and arguments as to relevancy, we conclude that the document the County wishes to introduce into evidence is not material to and would not affect the disposition of the proceeding and thus would not constitute good cause to reopen the hearing. In determining whether a group of employees should be included in an existing unit or established as a separate

3/ Gehl Company, Dec. No. 9474-G (WERC, 5/71); City of Milwaukee, Dec. No. 13558-A,C (WERC, 5/76); Chippewa Falls Area School District, Dec. No. 16011-C (Henningsen, 4/78); School District of Marinette, Dec. No. 19542-A (Crowley, 5/83); Sauk County, Dec. No. 21128-A (McLaughlin, 3/84).

unit the Commission gives consideration to a number of factors, which are listed and discussed below in the next section. Proofs at hearing that a number of the employees at issue do not want to be part of the larger bargaining unit are not among those factors and would not be material to or affect the disposition of this case. Similarly we would not consider relevant in these circumstances any claims by Local 990 that it has authorization cards from certain of the employees in question. Therefore, the Examiner correctly denied the County's motion to reopen the record, and we deny the motion to re-open the hearing.

BARGAINING UNIT DETERMINATION

By its petition to unconditionally include in its bargaining unit the positions listed in Finding of Fact 7, with the exception of the Executive Secretary, Local 990 was in effect requesting that all of the positions in the Sheriff's Department which the County alleged were unrepresented be included in Local 990's unit. However, subsequent to Local 990 filing its petition, the County, on January 16, 1984, filed a unit clarification petition with the Commission requesting that approximately twenty civilian jail guards be excluded from the existing unit of Deputy Sheriffs and Criminal Investigators. 4/ In a separate decision issued today, the Commission has determined that exclusion of the jailors from the deputy sheriffs' unit is required by well established WERC case law interpreting Sec. 111.77, Stats. Thus, in evaluating the parties' arguments, the Commission has considered that exclusion of the twenty civilian jail guards.

The following factors are taken into consideration by the Commission in the establishment of appropriate collective bargaining units under MERA:

1. Whether the employees in the unit sought share a "community of interest" distinct from that of other employees.
2. The duties and skills of employees in the unit sought as compared with duties and skills of other employees.
3. The similarity of wages, hours and working conditions of the employees in the unit sought as compared to wages, hours and working conditions of other employees.
4. Whether the employees in the unit sought have separate or common supervision with all other employees.
5. Whether the employees in the unit sought have a common work place with the employees in said desired unit or whether they share the work place with other employees.
6. Whether the unit sought will result in undue fragmentation of bargaining units.
7. Bargaining history

Important background facts in this case are the creation of the Kenosha City and County Joint Services Board, the subsequent move of the Sheriff's Department to the Public Safety Building in 1982, and the resulting reassignment of duties.

4/ At hearing on Local 990's petition, the County moved to consolidate the two matters. The motion was denied; however, the County's arguments in each case was premised on its contention that a unit comprised of all non-sworn employees of the Sheriff's Department, i.e. a law enforcement support staff unit, would be appropriate under the anti-fragmentation policy. In reaching its decision in the present proceeding, the Commission reviewed the record and arguments in both cases, but has not formally consolidated the matters. See Kenosha County (Sheriff's Department), Dec. No. 21910 (WERC, 8/84), also issued today. Local 990 was apprised of the proceedings in response to the County's petition but did not move to intervene.

Prior to these events, most of the duties performed by the employees in question here were performed by Matrons, Jailors or Deputy Sheriffs, all of whom were part of the bargaining unit represented by the Deputy Sheriff's Association. Thus, there were traditionally very few positions of a predominantly clerical nature in the Sheriff's Department. However, as described in Finding of Fact 12, the record does show that the clerical positions which did exist in the Department were historically treated by the parties as being included in the bargaining unit represented by Local 990. Further evidence of this fact is the inclusion, from 1979 on, of a provision in the County's collective bargaining agreement with Local 990 which expressly deals with work shifts in the Sheriff's Department. This provision provides that should more than one shift become necessary for clerical employees in the Sheriff's Department, the County agrees to negotiate with Local 990 on shift hours, assignment to shift, and the shift differential. Thus, we conclude that Local 990 has historically represented clerical type employees in the Kenosha County Sheriff's Department.

We reject the County's contention that because the exact positions previously represented by Local 990 no longer exist (i.e. clerk/steno, computer operator), Local 990 has no history-based claim to represent any of the new positions. Local 990 represented clerical positions in the Sheriff's Department. In a memorandum from the County's Personnel Office to the County Personnel Committee, describing the new positions and requesting funding for them, 5/ the County lists the positions of bookkeeper, civil process clerk, general receptionist/secretary, detective unit secretary, and Huber clerks as "clerical" positions, describes their duties as clerical, and recommends pay for them at the Clerk Typist I rate. It is clear that these positions are clerical in nature. Further, almost all of these positions involves work on the first shift, as do most of the other positions represented by Local 990. These positions are not closely related to jail operations. Local 990 represents clerical workers in many different County departments, with clericals in the Parks Department and Brookside Care Center being limited exceptions. Local 990 already represents two employees in the Public Safety Building, which is only one block away from the Courthouse. Thus we conclude that these positions share a community of interest with the members of Local 990's bargaining unit because of the similarity in duties, skills, wages, hours and working conditions and because of the bargaining history between the parties.

We reject the County's argument that inclusion of these clerical positions in the existing unit is barred by the City of Cudahy "policy." 6/ As discussed above, we have determined that clerical positions have historically been included in the unit by the parties. On its face, the contractual recognition clause does not explicitly exclude clerical positions in the Sheriff's Department, which was originally located in the Courthouse Annex. We reject the County's argument that Local 990, as petitioner, was obliged to further establish with direct evidence that positions similar to those which it now seeks to include were not in existence at the time of the voluntary recognition. Given that the County has argued that these positions were newly created for the move to the Public Safety Building, it is valid to infer that they did not exist previously. Furthermore, the transfer of work assignments from Matrons, Jailors and Deputies to civilian employees and other changes brought about by the formation of the Joint Services Board constitute intervening events such as to render the Cudahy decisions inapplicable in these circumstances.

We also are not persuaded by the County's argument that Local 990 specifically disclaimed interest in or representation of the positions in question because of the grievance filed by Local 990 involving the recall of two laid-off

Local 990 employees. 7/ The record indicates that the creation of the City-County Joint Services Board, the change in duty assignments, and the transfer to the Public Safety Building created confusion as to the exact identity of the various employers involved. The testimony of Glenda Salerno, Vice-President and Steward of Local 990, establishes that the reason Local 990 stated that the two clerical positions were not part of Local 990's unit was that Local 990 believed the two positions were covered by the Joint Services Board, a new and independent employer entity. (Tr. 114-119, 120-25) Given that a number of clericals in the new Public Safety Building were employees of the Joint Services Board, that confusion is understandable and cannot be said to constitute a specific disclaimer of the right to represent these positions.

Thus, for all of the foregoing reasons we conclude that it is appropriate that the Local 990 unit include those present positions which are primarily clerical in nature, i.e. General Reception/Secretary, Detective Unit Secretary, Civil Process Clerk, Bookkeeper I/Receptionist, and Bookkeeper II.

We have not, however, included the remaining positions, i.e., Control Center Operators, Booking, Cooks, and Cooks' Helpers in Local 990's unit because of additional factors. As of today, the civilian jail guards have been excluded from the deputy sheriff's unit because the jailers lack the power of arrest. These jailers and the above listed positions are closely related to the jail operations on the second floor of the Public Safety Building. 8/ There is no history of Local 990 representing any cooks or any employees with security duties. Furthermore, these positions generally require 2 or 3 shifts and coverage for seven days a week. Therefore, this group of employees has not been unconditionally included in Local 990's existing unit. Since no labor organization has petitioned us to conduct an election involving this group of employees we are not directing any election.

STATUS OF CHIEF COOK

The County has argued that the position of Chief Cook, currently occupied by George Volpentesta, should be excluded from any bargaining unit as a supervisory and managerial position. While the Chief Cook takes part in preparing the annual budget for the purchase of food and kitchen equipment, the record does not establish that he participates in the formulation, determination and implementation of policy in a significant manner nor does he have effective authority to commit the County's resources independently; thus, he is not excluded as a managerial employee. While the written documents 9/ also do not indicate significant supervisory authority associated with the position, there was testimony from Roger Schoenfeld, Chief Deputy Sheriff, that the Chief Cook has

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- 7/ Two members of Local 990's bargaining unit on lay off were "recalled" by the County to positions in the Public Safety Building. Local 990 protested that such action was not a "recall" because the positions were not in the bargaining unit. Local 990 representatives testified herein that they based that protest and argument on their belief that the positions were not County positions but that they were instead Joint Services Board positions since they were in the Public Safety Building. In related discussions with the County Personnel Office, Local 990 was told that the positions were not "990" positions. (Tr. 124-25) This would only reinforce Local 990's belief that the Joint Services Board, rather than the County, was the actual employer. The grievance was eventually settled.
- 8/ In fact, County Exhibit 10, which is an inter-office memorandum from the County's Personnel Director to the County Personnel Committee reviewing the proposed positions in the new building, breaks the new organization down into "clerical", which includes all of the positions we have included in Local 990's unit, and "Jail", which includes the Control Center Operator, Booking, Jailers, Cooks and Cooks Helpers.
- 9/ See County Exhibit 8 (a written job description for Chief Cook), and County Exhibit 14 (a statement to the County Personnel Committee from Ray Arbet of the Personnel Office, dated January 11, 1983, in support of the Personnel Office's request that Volpentesta be reclassified to "Chief Cook" and be given a higher salary).

been responsible for written evaluations of the five other kitchen employees, that he has issued verbal and written reprimands, that he is now paid more than the other kitchen employees, and that he will be actively involved in the hiring process when new kitchen employees are hired. It appears that the Chief Cook is in the process of assuming increasing supervisory authority. Based upon the foregoing reasons, we have concluded that he should be excluded from the unit as a supervisory employee.

STATUS OF BOOKKEEPER II

The County seeks to exclude the Bookkeeper II from the bargaining unit as a confidential and managerial employee. The Commission has consistently held that

. . . in order for an employee to be considered a confidential employee, and thereby excluded from the bargaining unit, such an employee must have access to, have knowledge of, or participate in confidential matters relating to labor relations. In order for information to be confidential for such purpose it must be the type of information that deals with (1) the employer's strategy or position in collective bargaining, contract administration, litigation, or other similar matters pertaining to labor relations between the bargaining representative and the employer and (2) is not available to the bargaining representative or its agents. 10/

Mere access to the personnel files, even if they contain information for background checks, is an insufficient indication of confidential status since such materials are not related to labor relations.

As her duties are described in Finding of Fact 24, the Bookkeeper II does not routinely handle matters related to labor relations. The Executive Secretary, who has already been excluded from the bargaining unit as a confidential employee by agreement of the parties, usually handles the clerical work associated with such matters. While the Bookkeeper II assumes certain of these duties when the Executive Secretary is absent, the record does not establish that the Bookkeeper's possible assumption of confidential duties is more than of a de minimus nature, nor that these duties could not be assumed by the confidential employees in the County's Department of Labor Relations and Personnel Department.

The record also does not establish that the Bookkeeper II is a managerial employee. The measure of managerial status is participation in the formulation, determination and implementation of policy in a significant manner, or the effective authority to commit the employer's resources. 11/ The Bookkeeper II's duties, as described in Finding of Fact 24, may be of an increasing level of responsibility but they are insufficient in nature and extent to establish managerial status. Here budget analysis duties primarily include the maintenance of the Department's books, and projections of expenditures and remaining funds. She can only order goods from vendors and providers approved by the County, and she does not have authority to negotiate prices. Such duties do not constitute true managerial duties.

Dated at Madison, Wisconsin this 17th day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner

10/ Douglas County, Dec. No. 8433-D (WERC, 8/82).

11/ City of Milwaukee v. WERC, 71 Wis.2d 709, 716-717, (1976).